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CIMB BANK BHD

v.

MUZLAN ARIFFIN

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HIGH COURT MALAYA, KUALA LUMPUR
ANANTHAM KASINATHER J
[SUIT NO: D-22-2216-2008]
21 SEPTEMBER 2010

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CIVIL PROCEDURE: *Counterclaim - Striking out - Application for - Whether defendant's counterclaim devoid of merit - Loan facility - Staff housing loan facility given to defendant by plaintiff bank - Whether defendant had fully settled the debt - Whether defendant still indebted to plaintiff bank - Conversion of housing loan to new account - Whether*

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with defendant's consent - Whether defendant enjoyed benefit of loan over 20 years - Defence of time bar - Whether could be relied upon by defendant as foundation to mount a claim against plaintiff for recovery of security

E

CIVIL PROCEDURE: *Striking out - Application for - Application to strike out defendant's counterclaim - Loan facility - Staff housing loan facility given to defendant by plaintiff bank - Whether defendant had fully settled the debt - Whether defendant still indebted to plaintiff bank - Conversion of housing loan to new account - Whether with defendant's consent - Whether defendant enjoyed benefit of loan over 20 years - Defence of time bar - Whether could be relied upon by defendant as foundation to mount a claim against plaintiff for recovery of security - Whether counterclaim devoid of merit*

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The plaintiff was a bank and the defendant was a credit officer of the plaintiff's predecessor in title, namely Bank Bumiputra Malaysia Berhad ('BBMB') at its sec. 14 branch in Petaling Jaya ('the sec. 14 branch'). On 28 March 1986, the plaintiff was granted a staff housing loan for a property ('the property') which was jointly purchased in the names of the defendant and his wife. In April

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1989, the defendant was transferred from the sec. 14 branch to the Head Office. The transfer of the housing loan account from sec. 14 to the head office resulted in the transfer of the outstanding amount in the sec. 14 account to the new head office account, which caused BBMB to issue a statement of account

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reflecting a nil balance in the sec. 14 account. In June 1989, the defendant tendered his resignation. Arising from the defendant ceasing to be a member of the staff of BBMB, the defendant was

duly notified of the plaintiff's decision to convert his staff housing loan facility into an ordinary fixed loan facility bearing a new loan account ('the new account') which involved the defendant paying interest at the rate of 3.25% above BLR on the outstanding sum. The plaintiff commenced encl.1 to recover monies pursuant to the loan granted to the defendant but had it withdrawn. The defendant, however, counterclaimed *via* encl. 7 and submitted that (i) he had paid the loan amount as evidenced by the plaintiff's statement account of 31 December 1999; (ii) the conversion of his staff housing loan to the new account was without his consent and (iii) the plaintiff's claim against him was time barred. Enclosure 12 was an application by the plaintiff to strike out the counterclaim which was premised on the plaintiff's contention that the outstanding amount in the sec. 14 account was never settled, contrary to the assertion of the defendant.

Held (allowing encl. 12 to strike out defendant's counterclaim):

(1) The claim of the defendant that he had settled the debt was totally devoid of merit as the contents of the bank's letter of 28 June 1989 clearly notified the defendant of his continuing indebtedness to the bank. The defendant did not have a single document to prove the payment of any part of the loan by him. The plaintiff had discharged the burden of proving that the defendant continued to be indebted to it. (para 6)

(2) The defendant's claim that he was not liable because he never agreed to the conversion of his staff housing loan was devoid of merit. The defendant was stopped, in law, from relying on this defence at this juncture. The defendant was first notified of this conversion as early as 26 September 1989 and the defendant had since then enjoyed the benefit of this loan. Thus the defendant was precluded from raising this defence after having enjoyed the benefit of this loan over the last 20 years. (para 7)

(3) The defence of time bar could not be relied upon by the defendant as the foundation to mount a claim against the plaintiff for the recovery of the security. A debtor cannot seek to recover property forming the subject matter of security to a lender save upon the payment of the monies due to the lender. The payment of the debt under the covenants of the

A loan agreement must be satisfied in full, in law, before the debtor can seek to recover the security (*Ali Hassan v. Bumiputra Commerce Finance Bhd*). Upon this court finding that the defendant was still indebted to the plaintiff, the defendant's counterclaim founded, as it was, on the defendant B having fully settled the debt, must necessarily be struck out. (para 8)

Case(s) referred to:

Ali Hassan v. Bumiputra Commerce Finance Bhd [2003] 6 CLJ 301 HC ***(refd)***

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For the plaintiff - Sheryl Kwan; M/s Rosley Zechariah
For the defendant - Muhamad Fadzil Hassan; M/s Fadzil Alimi & Assoc

Reported by Suhainah Wahiduddin

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JUDGMENT

Anantham Kasinather J:

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Background Facts

[1] The plaintiff is a bank. The defendant was, at all material times, a credit officer of the plaintiff's predecessor in title, namely Bank Bumiputra Malaysia Berhad ('BBMB') at its sec. 14 branch. F The plaintiff was granted a staff housing loan *via* a letter of offer dated 28 March 1986. The loan was secured by way of a joint assignment of a property whereby the Government of Malaysia was granted first priority of assignment having granted a loan of RM90,000 in favour of defendant's wife. The property known as G Lot 69-E-1B, Jalan Raja Abdullah, Kg. Baru, Kuala Lumpur ('the property') was jointly purchased in the names of the defendant and his wife. Pending issuance of a strata title, the loan was secured by way of joint deed of assignment duly signed by the Government of Malaysia, BBMB and the defendant and his wife. H The staff housing loan from the defendant's sec. 14 account was fully released on 24 December 1986. In April 1989, the defendant was transferred from the sec. 14, Petaling Jaya branch of BBMB to the security department at the Head Office in Kuala Lumpur. This transfer caused BBMB to open a new housing loan account, I with a different number at the Head Office. The transfer of the

housing loan account from Sec. 14 to the Head office resulted in the transfer of the outstanding amount in the sec. 14 account to the new Head Office account. This caused BBMB to issue a statement of account reflecting a nil balance in the sec. 14 account (see pp. 25 and 28 of exh. AM2 & AM4 to encl. 11).

[2] In June 1989, the defendant tendered his resignation effective 26 September 1999. At the time of his resignation, the defendant was duly notified of the outstanding amount due to BBMB as at 21 June 1989 (see pp. 29 to 32 of exh. AM4 to encl. 11). Arising from the defendant ceasing to be a member of the staff of BBMB, the defendant was duly notified of the plaintiff's decision to convert his staff housing loan facility into an ordinary fixed loan facility bearing a new loan account number of 031-001-3192360 ('new account'). The new account involved the defendant paying interest at the rate at 3.25% above BLR on the outstanding sum which as at 25 September 1999 stood at RM36,533.47 (see pp. 33 to 36 of exh. AM4 to encl. 11). The plaintiff commenced encl. 1 to recover monies pursuant to a loan granted to the defendant. The plaintiff thereafter withdrew encl. 1. This withdrawal would have resulted in the closure of this file but for the counter-claim of the defendant in encl. 7. The counter-claim is for the execution of the relevant documents by the plaintiff for the re-assignment of the property to the defendant, free of any encumbrance.

Basis Of The Defendant's Counter-Claim

[3] The defendant's counter-claim is simply this. He has paid the loan amount as evidenced by the plaintiff's statement account of 31 December 1999 (see p. 25 of exh. AM2). The nil balance reflecting such payment. Secondly, that he never consented to the opening of the new account. In other words, that the conversion of his staff housing loan to the new account was without his consent. Finally that the plaintiff's claim against him is time barred.

Enclosure 12

[4] Enclosure 12 is an application by the plaintiff to strike out the counter-claim. The application is premised on the plaintiff's contention that the outstanding amount in the sec. 14 account was never settled, contrary to the assertion of the defendant. In my judgment, whether the defendant still owes the plaintiff monies, depends on whether the nil balance reflected in BBMB's

A statement of account affords conclusive evidence of the defendant's indebtedness having been settled in full. In my opinion, the statement of account affords *prima facie* evidence only that the debt has been settled. To the extent that the author of this statement BBMB contends to the contrary, the burden, then
B shifts, to the plaintiff to satisfy the court that this document does not reflect the true position.

[5] The plaintiff sought to discharge this burden by producing the documents at pp. 29 to 32 of exh. AM4 to encl. 11. These
C documents reveal that the statement of account containing the nil balance only formed part of a series of documents issued by the plaintiff to notify the defendant that his sec. 14 account had been closed and the outstanding in this account transferred to the Head Office and thereafter that a new account had been opened
D in his name arising from his resignation from the company. The new account and the conversion of his account from staff housing loan account to an ordinary account, being the direct result of the defendant ceasing to be an employee of the plaintiff.

E **[6]** In my judgment, the claim of the defendant that he had settled the debt is totally devoid of merit as the contents of the bank's letter of 28 June 1989 clearly notifies the defendant of his continuing indebtedness to the bank. I am fortified in coming to this conclusion, by the absence of any documents evidencing the
F settlement of the debt by the defendant. Counsel for the defendant during oral submissions, conceded that the defendant did not have a single document to prove the payment of any part of the loan by him. Accordingly, I hold that the plaintiff has discharged the burden of proving that the defendant continues to
G be indebted to it.

[7] The defendant's claim that he is not liable because he never agreed to the conversion of his staff housing loan is equally devoid of merit. The defendant is stopped, in law, from relying on this defence at this juncture. The facts reveal that the defendant was
H first notified of this conversion as early as 26 September 1989 (see p. 33 of encl. 1) and the defendant enjoyed the benefit of this loan, since that date. BBMB could clearly have taken steps to recover the staff loan in 1989 if the defendant had made known his objection to the conversion, at that point of time. In my
I judgment, the defendant is precluded from raising this defence after having enjoyed the benefit of this loan over the last 20 years.

[8] The only remaining defence of the defendant is that the claim is time barred. In my judgment, time bar may be a good defence to the plaintiff's claim but it cannot be relied upon as the foundation to mount a claim against the plaintiff for the recovery of the security. In law, a debtor cannot seek to recover property forming the subject matter of security to a lender save upon the payment of the monies due to the lender. The payment of the debt under the covenants of the loan agreement must be satisfied in full, in law, before the debtor can seek to recover the security (see *Ali Hassan v. Bumiputra Commerce Finance Bhd* [2003] 6 CLJ 301). On the facts of this case, upon this court finding that the defendant is still indebted to the plaintiff, the defendant's counter-claim founded, as it is, on the defendant having fully settled the debt, must necessarily be struck out.

Accordingly, I allow encl. 12 and strike out the defendant's counter-claim. I order the defendant to pay the plaintiff the sum of RM3,500 towards account of costs of encl. 12.